STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOCAL 228, AFFILIATED WITH MILWAUKEE DISTRICT COUNCIL 48, AFSCME, AFL-CIO, Complainant, vs. CITY OF WEST ALLIS, Respondent.	Case XXXV No. 20281 MP-598 Decision No. 14452-A

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Local 228, affiliated with Milwaukee District Council 48, AFSCME, AFL-CIO, herein collectively referred to as Complainant, having filed a complaint on March 15, 1976 alleging that City of West Allis, herein referred to as Respondent, has committed prohibited practices within the meaning of Section 111.70, Stats.; and the Commission having by Order dated March 18, 1976 appointed Stanley H. Michelstetter II, a member of its staff, as Examiner, pursuant to Section 111.07 (5), Stats.; and hearing having been held before the examiner concluding May 28, 1976; and the examiner having considered the evidence and arguments of the parties, and being fully advised in the premises makes and issues the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. That Complainant, Local 228, affiliated with Milwaukee District Council 48, AFSCME, AFL-CIO, is a labor organization with offices at 3427 West St. Paul Avenue, Milwaukee, Wisconsin.

2. That Respondent City of West Allis is a municipal employer with offices at 7525 West Greenfield Avenue, West Allis, Wisconsin.

3. That at all relevant times Complainant has been the representative of certain of Respondent's employes including Arleen Papp who at all relevant times has been employed in the offices of Respondent's City Treasurer in the classification of Cashier/Typist under the supervision of City Treasurer Warren Hirschinger; that Complainant and Respondent have been party to various comprehensive

collective bargaining agreements with respect to said employes the most recent one of which was executed September 2, 1975 and which does not expressly forbid conduct proscribed by Section 111.70 (3)(a)3, Stats., but which contains grievance and arbitration provisions and which provide in relevant part:

" . . .

ARTICLE IV - UNION ACTIVITY

. . .

B. The Union may designate up to four (4) authorized stewards, one each for City Hall, Library, Health Department and Police Department and shall furnish the names of such stewards to the City. Such stewards shall not investigate or process grievances during regular working hours, unless permission to do so including the amount of time allowed has been given in advance by the steward's department head or his representative and also by the department head or his representative of the department involved in the grievance. The City agrees that such permission will be granted and reasonable time allowed to investigate and process grievances of an emergency nature provided other work operation are not stopped or unduly slowed or hampered.

Those authorized Union representatives who are not employed shall be permitted reasonable access to City work areas in order to conduct legitimate business. Such representatives shall aecure permission from the department head or his authorized representative in order to meet with an employee during working hours.

No Union meeting shall be held on City time.

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D. The Union shall advise the City of the names of its negotiators. If negotiation meetings are called by the City during normal City working hours, i.e., 8:00 a.m. to 5:00 p.m. (excepting mediation or fact finding meetings), the City will pay the base salary of the designated negotiators who may participate in such meetings.

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ARTICLE VIII - WAGES, HOURS AND WORKING CONDITIONS

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P. Grievance and Arbitration Procedure

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4. Arbitration

. . .

(e) Cost of Arbitration

Expenses for the arbitrator's services and the proceedings shall be borne equally by

the City and the Union; however, each party shall be responsible for compensating its own representatives and witnesses.

. . . "

4. That at all relevant times prior to April 11, 1974 Respondent, its officers and agents responsible therefor, considered the merits of all requests for reallocation and reclassification of any of its positions, whether included in collective bargaining units or not, granting those it deemed meritorious.

5. That on or about April 11, 1974 Respondent adopted a policy of refusing to grant reallocation and reclassification requests initiated after April 11, 1974 with respect to positions included in any collective bargaining unit during the term of an applicable collective bargaining agreement; that at all relevant times after April 11, 1974 Respondent continued to consider and grant reallocation and reclassification requests with respect to positions occupied by other personnel.

6. That immediately prior to December 18, 1974 Papp requested Hirschinger to initiate a request to reclassify her position to the higher paid position of Account Clerk I; that Hirschinger thereupon declined on the basis of the policy mentioned in Finding of Fact 5 above.

7. That on or about February, 1975 Complainant introduced the above-mentioned request in its collective bargaining proposals for the 1975-76 agreement; that the foregoing request was withdrawn prior to September 2, 1975.

8. That thereafter Respondent modified the policy specified in Finding of Fact 5, above, by considering the merits of all requests for reclassification of any positions, including those in bargaining units under agreements; that by the foregoing conduct and in the administration of the foregoing modified policy, Respondent was not unlawfully motivated.

9. That after the modification specified in Finding of Fact 8, and on November 19, 1975 Respondent, by its Civil Service Commission, held a hearing with respect to a request made by Complainant that Respondent reclassify the position occupied by Arlene Papp to a classification four pay ranges higher; that thereafter and solely on the basis of its conclusions with respect to the merits of the request, the Civil Service Commission declined to recommend the requested change to Respondent, but instead recommended the position be reallocated only one pay range higher.

10. That on December 10, 1975, and at all relevant times thereafter, Respondent has refused, and continues to refuse, (on the basis of the policy specified in Finding of Fact 5, as modified), to consider or grant the reallocation recommended by its Civil Service Commission; that Respondent has not been, and is not unlawfully motivated with respect to the foregoing conduct.

11. That Respondent refused, and continues to refuse, to pay Arlene Papp for time spent in hearing in the instant matter; that Respondent has not been, and is not, unlawfully motivated with respect to the foregoing conduct.

On the basis of the above and foregoing Findings of Fact, the examiner makes and files the following

CONCLUSION OF LAW

That Respondent City of West Allis by refusing to reallocate the position occupied by Arlene Papp and by refusing to compensate her for time spent in the hearing before the examiner has not committed, and is not committing, prohibited practices within the meaning of Section 111.70 (3)(a)3 or 5., Stats.

On the basis of the above and foregoing Findings of Fact and Conclusion of Law, the examiner makes and files the following

ORDER

It is ordered, that the complaint filed in the instant matter be, and the same hereby is, dismissed.

Dated at Milwaukee, Wisconsin, this 15th day of June, 1977.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stanley H. Michelstetter II
Stanley H. Michelstetter II
Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Complainant alleges Respondent[1/] unlawfully modified or applied its April 11, 1974 policy to discriminate against Papp individually, or against all of the members of the instant bargaining unit as a whole. More specifically it alleges Respondent used the foregoing policy as a pretext to discriminate against Arlene Papp for her exercise of protected rights, when it declined to consider the merits of the Civil Service Commission's recommendation to reallocate Papp's position one pay range higher. At hearing Complainant amended its complaint to allege the aforementioned conduct constituted discrimination in violation of the parties' collective bargaining agreement and to allege Respondent discriminated against Papp by refusing to pay her for attendance at the hearing before the examiner in violation of the agreement and independently in violation of Section 111.70 (3)(a)3.[2/]

Respondent denies that it discriminated against Papp or the instant unit. It alleges it has consistently administered its April 11, 1974 policy to refuse to consider reallocation request with respect to employes in bargaining units under agreement. It denies the policy was ever enforced with respect to reclassification requests, or that it has made any exception to the policy.

DISCUSSION

The record clearly establishes Respondent adopted and initially enforced its April 11, 1974 policy. Thus, prior to September 2, 1975 Respondent refused to consider requests for both reallocations and reclassifications with respect to employes in bargaining units while agreements were in effect. The parties both conclude Respondent considered the merits of reclassification requests after September 2,

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1/ The term "Respondent" is used herein to denote collectively the City of West Allis, all of its officers and agents, including but not limited to, its Common Council. In some contexts the term primarily refers to the Common Council acting on its own or through its Public Administration Committee.

2/ The parties waived deferral to the grievance and arbitration procedure. The examiner orally ruled the instant agreement does not require Respondent to pay employes for attendance at the instant proceedings, nor apply to the instant allegations of discrimination. These matters will not be reviewed further. Complainant has also made argument with respect to matters not appropriately before the examiner. Those are not discussed.

1975. Complainant has offered no evidence, nor any reason to believe the foregoing change was discriminatory, nor any evidence of discriminatory administration among the various bargaining units.

After September 2, 1975 there were a total of two reallocation requests, one which Respondent granted and the instant request. While Respondent strenuously argues it has continued to enforce its policy by refusing to consider reallocation request in units under agreement, the data suggests we await further results. In the meantime, some facts are apparent. In the one case, Respondent reallocated a secretarial/stenographer in the instant unit in the same manner as it had previously reallocated non bargaining unit positions it deemed identical. Complainant has not argued that action was discriminatory. On the other hand, no similar circumstances existed in the instant case. Instead, the Civil Service Commission had rejected Papp's request to be reclassified four pay ranges higher, solely on its merits, and made the minimum possible recommendation to reallocate Papp only one pay range higher.[3/] Complainant admits the actions of the Civil Service Commission were lawfully motivated. Complainant itself had withdrawn a related proposal in negotiations. Kend's testimony credibly suggested he believed the request to be without merit. Taken with the total absence of any evidence of the usual indicia of discriminatory conduct, the clear and satisfactory preponderance of the evidence establishes Respondent denied Papp's request, and alternatives thereto, solely for reasons other than those proscribed by Section 111.70 (3)(a)3, Stats. Accordingly, the complaint has been dismissed.

Dated at Milwaukee, Wisconsin, this 15th day of June, 1977.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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3/ Assuming the Civil Service Commission was aware of Respondent's policy of not considering reallocation requests in units under contract, if any policy then existed, their recommendation could well have been viewed by Respondent as an intentional "kiss of death".